Supreme Court, U. S.
FILED
OCT 27 1977
MICHAEL RODAK, JR., CLERK

No. 77-8

In the Supreme Court of the United States

OCTOBER TERM, 1977

MEHENDRA R. MEHTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

SHIRLEY BACCUS-LOBEL,
PATTY ELLEN MERKAMP,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statement	2
Argument	4
Conclusion	11

CITATIONS

Cases:

Cardarella v. *United States*, 375 F. 2d 222, certiorari denied, 389 U.S. 882	9
Costello v. *United States*, 350 U.S. 359	6
Goldberg v. *United States*, 425 U.S. 94	7
Lawn v. *United States*, 355 U.S. 339	10
Morgan v. *United States*, 309 F. 2d 234, certiorari denied, 373 U.S. 917	4, 5
United States v. *Agurs*, 427 U.S. 97	7
United States v. *Cruz*, 478 F. 2d 408, certiorari denied *sub nom. Aleman* v. *United States*, 414 U.S. 910	6
United States v. *D'Amato*, 507 F. 2d 26	4
United States v. *Dupree*, 553 F. 2d 1189, pending on petition for a writ of certiorari, No. 77-5059	7
United States v. *Erhardt*, 381 F. 2d 173	4

BEST COPY AVAILABLE

Page

Cases—continued:

United States v. *Fulle*, 544 F. 2d 519, certiorari denied, No. 76-992, May 31, 1977 .. 7

United States v. *Gilliland*, 312 U.S. 86 5

United States v. *Harris*, 560 F. 2d 148, pending on petition for a writ of certiorari, No. 77-5149 7

United States v. *Harris*, 542 F. 2d 1283, certiorari denied *sub nom. Clay* v. *United States*, 430 U.S. 934 7

United States v. *Harris*, 543 F. 2d 1247 ..... 6, 7

United States v. *Harrison*, 524 F. 2d 421 6

United States v. *Lovasco*, No. 75-1844, decided June 9, 1977 10

United States v. *Mase*, 556 F. 2d 671 6

United States v. *McCallie*, 554 F. 2d 770 6

Constitution, statutes and rule:

United States Constitution, Sixth Amendment 9

Immigration and Nationality Act of 1952, Section 212(a)(14), 66 Stat. 183, 8 U.S.C. 1182(a)(14) 3

Jencks Act, 18 U.S.C. 3500 7

18 U.S.C. 3500(e)(1) 7

18 U.S.C. 3500(e)(2) 7

18 U.S.C. 1001 ..... 2, 5

18 U.S.C. 1621 4

Rule 23(c), Fed. R. Crim. P. 10

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-8

MEHENDRA R. MEHTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1976. A petition for rehearing was denied on May 31, 1977 (Pet. App. B). The petition for a writ of certiorari was filed on June 30, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an attorney who willfully falsifies an application to the Department of Labor or the Immigration and Naturalization Service for a client's

labor certification may be convicted of making a false statement to a government department or agency, in violation of 18 U.S.C. 1001.

2. Whether the investigative procedures employed by the government in this case denied petitioner a fair trial.

3. Whether the government failed to disclose exculpatory material.

4. Whether petitioner, an attorney who was represented by retained counsel at trial and on appeal, was denied the effective assistance of counsel because he prosecuted his post-trial motions *pro se*.

5. Whether the district court made adequate findings of fact.

6. Whether petitioner was prejudiced by a chance, mid-trial meeting with the trial judge outside the courtroom.

STATEMENT

After a non-jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on seven counts of making false statements as to material facts in matters before the Department of Labor and the Immigration and Naturalization Service, in violation of 18 U.S.C. 1001. Petitioner was sentenced to concurrent terms of imprisonment for a year and a day on four counts. Imposition of sentence was suspended on the remaining three counts and petitioner received concurrent terms of three years' probation, the probationary term to commence upon completion of his sentence of incarceration. The court of appeals affirmed (Pet. 5; Pet. App. A).

Petitioner, a permanent resident alien, is an attorney in the State of Illinois whose practice consisted largely of immigration work. In particular, he assisted aliens in applying for labor certification and permanent resident status (Tr. 545-547). To qualify for labor certification, an alien must have a *bona fide* offer of a job in the United

States for which he or she will be compensated at the prevailing wage rate for the type of employment and for which no qualified American citizens are available (Tr. 486-512). See Section 212(a)(14) of the Immigration and Nationality Act of 1952, 66 Stat. 183, 8 U.S.C. 1182(a)(14).

The evidence showed that petitioner was retained by three aliens who desired to obtain permanent resident status. In return for payments well above his standard fee, petitioner agreed to handle their applications and to "create" the needed job offers.[1] For two of the aliens, Jazendra Vora and Arunkumar Dave, petitioner submitted labor certification forms to the Department of Labor which showed that they had job offers with Michael's T.V. & Radio Service in Chicago, Illinois, at the pay scale of $4.25 per hour for 40 hours a week. In fact, George Fried, the owner of the television store, had never met Vora or Dave and had never agreed to pay them $4.25 per hour or to employ them for 40 hours a week. Petitioner also falsely stated on the form that Vora and Dave had experience testing and calibrating electrical instruments and that the television store had annual sales of $75,000 (its annual sales actually had never exceeded $10,000). Vora, Dave, and Fried all signed the forms before the above information was recorded and did not supply petitioner with any of the false information. On the basis of these fictitious job offers, Vora and Dave received labor certifications from the Department of

---

[1]Petitioner would charge between $500 and $750 to represent an alien who had a *bona fide* job offer, but he would charge $2,500 to $3,500 if he had to "create" an offer (Tr. 30-34, 105-106). Immigration lawyers customarily charged between $800 and $1,200 for handling permanent resident applications based upon labor certifications (Tr. 797-798). Petitioner told one of the aliens, Jazendra Vora, that, although he could not legally charge him more than $750, he had to "pass money" to get information from the Department of Labor and thus would charge him $3,500 (Tr. 34-35).

Labor. Petitioner then filed applications for permanent resident status on their behalf with the Immigration and Naturalization Service (Tr. 30-44, 84-201, 261-279).

Petitioner was also retained by Jagdishbhai Patel after Patel's application for labor certification had been denied and he had been ordered to leave the country. Although Patel had a job paying $3.75 per hour, petitioner filed a labor certification form falsely stating that Patel's pay was $5.50 per hour. Patel's employer agreed to sign these forms only after petitioner told him that the pay rate referred to future wages rather than present salary and that "everybody does it." Labor certification nevertheless was denied because $5.50 was below the prevailing hourly wage rate of $6.28 for the specified job. Petitioner then prepared and submitted two letters to the Department of Labor from Patel's employer, falsely stating that Patel's salary had been increased to $6.30 per hour. Patel was granted labor certification shortly thereafter (Tr. 305-358).

ARGUMENT

1. Petitioner contends (Pet. 6-8) that 18 U.S.C. 1001 is unconstitutional as applied to the facts of this case. Relying on cases holding that 18 U.S.C. 1001 is inapplicable to false statements made by lawyers acting as advocates in federal judicial proceedings,[2] petitioner

[2]The cases cited by petitioner to support his proposition that 18 U.S.C. 1001 does not apply to false statements by attorneys in judicial proceedings are not in point. In *United States* v. *D'Amato*, 507 F. 2d 26 (C.A. 2), the court of appeals held that Section 1001 does not prohibit a party in a civil suit from filing a false affidavit that defrauds the other party but not the government. *United States* v. *Erhardt*, 381 F. 2d 173 (C.A. 6), involved the introduction of false documents into evidence by a defendant in a criminal proceeding, conduct that the court of appeals held was not within the intended scope of the statute and that was covered, if at all, by 18 U.S.C. 1621. *Morgan* v. *United States*, 309 F. 2d 234 (C.A. D.C), certiorari denied, 373 U.S. 917, most closely resembles the present case. In *Morgan*, the defendant was convicted of falsely stating, in documents submitted to a court, that he was an attorney and a member of the District of Columbia Bar while representing several clients in criminal proceedings. The court of appeals held that these statements were "administrative," rather than "judicial," in nature and were prohibited by 18 U.S.C. 1001.

argues that principles of due process and equal protection require that Section 1001 also not apply to statements made by lawyers acting as advocates in administrative hearings. Regardless of the merits of this equal protection claim, petitioner plainly was not acting as an advocate in an administrative hearing when he fabricated material information in an effort to obtain labor certification for his alien clients. The purpose of Section 1001 is to protect the government against those who would cheat and mislead it in the administration of its programs. *United States* v. *Gilliland*, 312 U.S. 86, 93. By submitting knowingly false applications, petitioner defrauded the government into issuing labor certifications to unqualified aliens (who paid petitioner exorbitant fees) and engaged in the very conduct that the statute was designed to prevent. Moreover, petitioner's statements were to an administrative agency in a non-adversarial setting, rather than in his capacity as a lawyer during a judicial or quasi-judicial proceeding. See *Morgan* v. *United States*, 309 F. 2d 234, 237 (C.A. D.C.), certiorari denied, 373 U.S. 917.

2. Petitioner contends (Pet. 8-11) that the government deprived him of his right to meaningful cross-examination by not presenting certain witnesses to the grand jury, not taking notes of some witness interviews, and destroying the original notes taken at other interviews. The court of appeals correctly rejected these claims. The purpose of a criminal investigation is not to assemble evidence for the defendant to use on cross-examination. The procedures employed by the government were fully consistent with constitutional and statutory requirements.

a. The government presented to the grand jury a federal agent who testified regarding the contents of the statements of different witnesses, all of which were turned over to petitioner. The agent also advised the grand jury

of the hearsay nature of his testimony. Petitioner's claim that this procedure violated his rights is foreclosed by *Costello* v. *United States*, 350 U.S. 359, where this Court upheld the validity of an indictment based exclusively on hearsay testimony. In *Costello*, the government called 144 witnesses at trial, only three of whom had testified previously before the grand jury. As in this case, the three witnesses were government agents who had summarized the evidence against the defendant. See also *United States* v. *Cruz*, 478 F. 2d 408, 411-412 (C.A. 5), certiorari denied *sub nom. Aleman* v. *United States*, 414 U.S. 910.

b. Petitioner also was not prejudiced by the manner in which the government interviewed prospective witnesses. Most interviews were stenographically recorded, and petitioner was provided with a copy of the witnesses' statements. Government agents or attorneys also spoke to these witnesses on other occasions, at times taking no notes or waiting several months to make a report. In some instances rough interview notes were destroyed after information was incorporated into reports. These reports were turned over to petitioner (Tr. 129, 136, 144, 156, 168-169, 184, 264-265, 350-355). Petitioner cites no authority that obliges an investigator to take notes at each interview.

Although, as petitioner points out (Pet. 11), the courts of appeals have taken divergent views on the producibility of rough interview notes of government agents (compare *United States* v. *Harris*, 543 F. 2d 1247 (C.A. 9), and *United States* v. *Harrison*, 524 F. 2d 421 (C.A. D.C.) with *United States* v. *Mase*, 556 F. 2d 671, 676 (C.A. 2), *United States* v. *McCallie*, 554 F. 2d 770, 773 (C.A. 6), and the cases cited in *Harrison, supra*, 524 F. 2d at 430, n. 25), this is not an appropriate case in which to resolve the issue.[3] Petitioner has not suggested any plausible reason

[3]We are unaware of any case in which the good faith destruction of rough interview notes in acordance with standard agency practice has led to the reversal of a conviction. In our view, interview notes are not producible under the Jencks Act unless they are "signed or otherwise adopted or approved" by the witness or are a substantially verbatim report of the interview. See 18 U.S.C. 3500(e) (1) and (2); *Goldberg* v. *United States*, 425 U.S. 94, 110-111, n. 19. In any event, this issue is of little continuing importance because the Federal Bureau of Investigation and the Internal Revenue Service, the government agencies most affected by the issue, have recently changed their internal procedures to require retention of the rough interview notes of their agents. See *United States* v. *Harris*, 560 F. 2d 148, 149 (C.A. 3), pending on petition for a writ of certiorari, No. 77-5149; *United States* v. *Dupree*, 553 F. 2d 1189, 1191 and n. 1 (C.A. 8), pending on petition for a writ of certiorari, No. 77-5059.

to believe that he was prejudiced by the good faith, routine destruction of the rough notes. The information in the notes was incorporated into reports that he did receive, and there is no evidence indicating that these reports were not complete and accurate. Furthermore, petitioner received extensive Jencks Act (18 U.S.C. 3500) materials from the prosecution to be used in cross-examining government witnesses. Finally, the evidence against petitioner was overwhelming. In these circumstances, "no substantial rights of [petitioner] have been affected by the destruction of the rough notes * * *." *United States* v. *Harris, supra*, 543 F. 2d at 1253.[4]

3. In response to petitioner's motion for disclosure of any promises of leniency to government witnesses, the prosecution stated that no such promises or inducements had been made. Petitioner contends (Pet. 12-15) that the fact that Vora and Dave were not deported shows that they had been granted prosecutorial leniency, the nondisclosure of which deprived him of a fair trial. See *United States* v. *Agurs*, 427 U.S. 97. However, petitioner was aware that, after his fraud had been discovered, Vora

[4]This Court has recently declined to review two cases raising the issue of the producibility of rough interview notes. *United States* v. *Fulle*, 544 F. 2d 519 (C.A. 7), certiorari denied, No. 76-992, May 31, 1977; *United States* v. *Harris*, 542 F. 2d 1283, 1292-1293 (C.A. 7), certiorari denied *sub nom. Clay* v. *United States*, 430 U.S. 934.

and Dave applied for and received valid labor certifications on the basis of jobs at which they were actually working and that they were in the process of seeking permanent resident status. Hence, the fact that the government did not deport the aliens does not indicate that undisclosed promises of leniency had been made to the two witnesses in exchange for their testimony. As the court of appeals noted (Pet. App. 4a-5a):

> [Their] applications [for labor certifications] were approved and they became eligible to apply for permanent resident status. The approval of their requests was an administrative ruling upon the merits of their claims by the Department of Labor and not an awarding of prosecutorial leniency. The fact that the government processed their labor certificates cannot now be transformed into a nondisclosure of exculpatory information.

In addition, the trial judge, who was the finder of fact in this case, stated that defense counsel had thoroughly explored Vora and Dave's immigration status, that counsel had pointed out that "the pressures were great on the government's witnesses to testify in support of the government's theory" (Tr. 977), and that Vora and Dave "were effectively cross-examined in regard to their immigration status" (H. Tr. 8).[5] Accordingly, the district court correctly held that petitioner's unsubstantiated allegations of prosecutorial misconduct "do not constitute facts entitling [him] to a new trial" (*ibid.*).

4. Petitioner, who was represented by retained counsel at trial and on appeal, asserts (Pet. 15) that he was denied the effective assistance of counsel on his post-trial motions because his trial counsel disagreed with his contention that the government had withheld Jencks Act

---

[5]"H. Tr." refers to the transcript of proceedings on petitioner's motion for a new trial.

material.[6] Petitioner, an attorney, therefore chose to argue the motions *pro se*. This did not deprive petitioner of his right to counsel, since the Sixth Amendment does not require a trial attorney to prosecute a frivolous motion for a new trial. Cf. *Cardarella* v. *United States*, 375 F. 2d 222, 230 (C.A. 8), certiorari denied, 389 U.S. 882. Moreover, petitioner could have retained other counsel to represent him at the hearings on his post-trial motions, but decided instead to proceed without counsel at that stage of the proceedings. Finally, his trial attorney had no obligation to remain silent at the post-trial hearing, since his testimony about the scope of discovery did not involve any confidential communications protected by the attorney-client privilege.

---

[6]At the hearing on the post-trial motion, petitioner's trial attorney testified (H. Tr. 263-265):

> There was, in my opinion, a full turnover of all documents, frankly, your Honor.
>
> In the years that I have been trying cases in this building I have never received as many documents, as often as I received them from Mr. Handler and Mr. Monico. * * *
>
> From time to time, Mr. Handler would send me material. I would send him material. I had the names of all of his witnesses, and if I needed to know where they lived, I got that. I gave him the names and addresses of all of our witnesses. If I needed information, all I had to do was call him.
>
> Now, furthermore, I issued, oh, 20, 30 subpoenas for documentary evidence. Material that I had trouble getting from Government agencies, Handler got for me.
>
> Sometimes he had trouble getting it and he pulled whatever strings he had to get it for us.
>
> When our subpoenaed material came in, I shared that with Mr. Handler.
>
> This is in the interest of seeing that justice is done to both sides. It allows a search for the truth in the courtroom.
>
> I have no reason to believe personally - I don't know what Mr. Mehta's feeling is, Judge, but I will give my feeling: I have no reason to believe or to suspect that any document or scintilla of

5. Although petitioner failed to make a timely motion requesting specific findings of fact (see Rule 23(c), Fed. R. Crim. P.), he claims (Pet. 16-17) that the district court failed to make findings adequate for a proper appellate determination of his case. However, the court of appeals observed no such deficiencies in the record and had little trouble in concluding that the trial judge's findings were supported by the evidence (Pet. App. 7a-8a). The district court expressly found that Vora and Dave were unqualified to work, and did not want to work, at Michael's T.V. & Radio Service, that the annual income of the television store did not approach $75,000, that the store was incapable of hiring Vora and Dave at the alleged wage rate, and that the store owner had not agreed to hire the aliens prior to signing their labor certification applications. The court also found that "the three statements regarding the wages to be paid to Patel were false." Finally, the court found that petitioner had knowledge of all of the above facts (Tr. 979-989).

6. Petitioner's final claim (Pet. 18) is that he was prejudiced by a brief, unintended meeting in a courthouse elevator among the trial judge, a prospective (but in fact unused) government rebuttal witness, and himself. Petitioner did not raise this issue in the court of appeals, and "[o]nly in exceptional cases will this Court review a question not raised in the court below." *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16. See also *United States* v. *Lovasco*, No. 75-1844, decided June 9, 1977, slip op. 5, n. 7. There are no exceptional circumstances here: petitioner does not specify in what manner the encounter might have been prejudicial to him, and the trial judge, after summarizing the episode, remarked that "the incident has had no effect on my decision" (Pet. App.

---

information that we were entitled to under [18 U.S.C.] 3500 was withheld at all.

On the contrary, more material was given than is normal in any case I have ever tried in this District.

22a). Petitioner offers no basis to disturb that determination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

SHIRLEY BACCUS-LOBEL,
PATTY ELLEN MERKAMP,
Attorneys.

OCTOBER 1977.